Court of Appeals, State of Michigan

ORDER

DOUGLAS MADDIX v PRIME PROPERTY ASSOCIATES INC

Docket No. 251223

LC No. 2002-003762-NO

HILDA R. GAGE
Presiding Judge

MARK J. CAVANAGH

RICHARD ALLEN GRIFFIN
Judges

The Court orders that appellee's motion for reconsideration is GRANTED, and this Court's opinion issued June 23, 2005 is hereby VACATED. A new opinion will be issued.

Judge Griffin not participating.

HILDA R. GAGE
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 27 2005
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

DOUGLAS MADDIX,

Plaintiff-Appellant,

v

PRIME PROPERTY ASSOCIATES, INC., MARCO SANTI and RONALD RUSSELL, d/b/a AMERICAN OAKS PROFESSIONAL CENTER,

Defendants-Appellees.

UNPUBLISHED
June 23, 2005

No. 251223
Macomb Circuit Court
LC No. 02-003762-NO

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants summary disposition. We reverse and remand.

Plaintiff worked in an office building managed by defendant Prime Property Associates, Inc., and owned by defendants, Marco Santi and Ronald Russell, d/b/a American Oaks Professional Center, in Utica. On January 16, 2002, snow had been falling for three to four hours when plaintiff left work at 8:00 p.m. He noticed the accumulation of snow on the ground, but he did not see any ice. As plaintiff began walking down a handicapped ramp leading to the adjacent parking lot, he slipped and fell, sustaining injuries to his left arm and shoulder. Plaintiff claims that although he did not see any ice before his fall, he felt "black ice" beneath his feet as he stepped down.

Plaintiff argues that the trial court erred in granting defendants summary disposition because there is a genuine issue of material fact about whether the ice was open and obvious. We review de novo a trial court's decision on a motion for summary disposition. *Rose v Nat'l Auction Group, Inc*, 466 Mich 453, 461; 646 NW2d 455 (2002). When reviewing a decision on a motion for summary disposition pursuant to MCR 2.116(C)(10), "we consider the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted by the parties in the light most favorable to the party opposing the motion." *Id.* Summary disposition is appropriately granted, "if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id*. We view the facts in a light most favorable to the nonmoving party. If the facts present an issue about which reasonable minds could differ, a genuine issue of material fact exists and summary disposition may not be granted. *Kenny v Kaatz Funeral Home, Inc*, 264 Mich App 99, 105; 689 NW2d 737 (2004).

Generally, a premises possessor has a duty to exercise reasonable care to protect an invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). This duty does not, however, extend to hazardous conditions that are open and obvious. "Where the dangers are known to the invitee or are so obvious that the invitee might reasonably be expected to discover them, an invitor owes no duty to protect or warn the invitee unless he should anticipate the harm despite knowledge of it on behalf of the invitee." *Id.* The test for an open and obvious danger is whether an average user with ordinary intelligence would have been able to discover the danger and the risk presented upon casual inspection. *Kenny, supra* at 105.

When an accumulation of snow and ice is open and obvious, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard only if there is some aspect of the accumulation that makes the accumulation unreasonably dangerous. *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 332; 683 NW2d 573 (2004). However, not all snow and ice accumulation is open and obvious. *Kenny, supra* at 107. In determining whether accumulation is open and obvious, we consider whether the plaintiff had actual knowledge of ice or snow-covered ice, *Corey v Davenport College of Business (On Remand)*, 251 Mich App 1, 5; 649 NW2d 392 (2002); *Joyce v Rubin*, 249 Mich App 231, 239-240; 642 NW2d 360 (2002), whether there was any previous rainfall or extensive thawing that might put one on notice of the presence of ice under snow, and whether the plaintiff observed other people slipping or taking special care traversing the same area, *Kenny, supra* at 108.

The trial court found that the snowy and icy condition was open and obvious because plaintiff had seen the snow before he fell. However, it noted no additional indicators that would alert plaintiff to the dangerous condition other than the mere accumulation of snow itself. There was no evidence of previous rainfall, extensive thawing, or others slipping or taking special care traversing the same area, and the mere accumulation of ice and snow does not constitute an open and obvious condition. *Quinlivan v Great Atlantic & Pacific Tea Co*, 395 Mich 244, 260; 235 NW2d 732 (1975); *Kenny, supra*. A reasonably prudent person would proceed much more cautiously while traversing ice, and there is no evidence that plaintiff was aware of the accumulation of ice underneath the snow. *Kenny, supra* at 109. Viewing the evidence in a light most favorable to plaintiff, we conclude that summary disposition should not have been granted on this basis alone.

Plaintiff also argues that, even if the snow-covered ice is open and obvious, defendant should be subject to liability because there were special circumstances that made the condition unreasonably dangerous. When an accumulation of snow and ice is open and obvious, the premises possessor must take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard only if there is some aspect of the accumulation that makes the accumulation unreasonably dangerous. *Mann*, supra at 332. We focus on the degree of potential harm presented, and there must be special aspects that create a uniquely high likelihood of harm or severity of harm if the risk is not avoided. *Lugo, supra* at 518 n 2, 519.

Plaintiff maintains that he would have encountered similarly icy and snowy conditions regardless of which exit he used. When plaintiff exited the building, he had the choice between using a staircase and a handicapped ramp to reach the parking lot. Plaintiff has not offered any evidence to suggest that he would have encountered snow-covered ice if he had used the staircase at this particular exit or one of the other six available exits. We cannot say that the

snow-covered ice present on the handicapped ramp was unavoidable. We therefore conclude that the trial court properly concluded that no special circumstances existed that made the risk of harm unreasonable.

Defendants argue, as an alternative ground for affirmance, that they owed no legal duty to plaintiff. *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). Because the trial court did not address whether defendants owed a legal duty to plaintiff, this issue is unpreserved. *Adam v Sylvan Glynn Golf Course*, 197 Mich App 95, 98; 494 NW2d 791 (1992). We may, however, review it because it is a question of law, and the facts necessary for its resolution have been presented. *Village of Hickory Pointe Homeowners Ass'n v Smyk*, 262 Mich App 512, 516; 686 NW2d 506 (2004).

A premises possessor generally has the duty to inspect the premises and make any necessary repairs or warn invitees of any discovered hazards or known dangers. *James v Alberts*, 464 Mich 12, 19-20; 626 NW2d 158 (2001). If the snow or ice hazard is not open and obvious, the premises possessor owes a duty to an invitee to take reasonable measures within a reasonable period of time after the accumulation to diminish the hazard. *Mann, supra* at 332; *Kenny, supra* at 107. With regard to the accumulation of snow, the general standard of care requires defendant to shovel, salt, sand, or otherwise remove the snow. *Lundy v Groty*, 141 Mich App 757, 760; 367 NW2d 448 (1985).

The evidence presented shows that snow began to fall at 3:00 or 4:00 p.m. Plaintiff slipped and fell at 8:00 p.m., after 2-1/2 to 3 inches of snow had accumulated. The snowfall continued until 10:00 p.m., with about one additional inch of accumulation after plaintiff's fall. It is undisputed that defendants did not take any measures to remove the snow or ice until after the snowfall stopped. Whether it is a breach of duty to wait until the snow stopped falling to take measures to remove the hazard is a question of fact for the jury. *Lundy, supra* at 760-761. We therefore reverse the trial court order granting defendants summary disposition and remand to the trial court for further proceedings consistent with this opinion.

The dissent focuses on plaintiff's failure to provide evidence that defendants had notice of the snowy and icy condition and therefore owed plaintiff a duty. We cannot, however, disregard the precedent in *Mann, supra* and *Kenny, supra.* Defendants clearly owed plaintiff a duty, and that duty is dictated by whether the danger presented by the snow-covered ice was open and obvious. If the danger was not open and obvious, defendants owed a duty to take reasonable measures within a reasonable period of time to diminish the hazard. *Id.*; *Kenny, supra* at 107. If the danger was open and obvious, defendants' duty was to take reasonable measures within a reasonable period of time *only if* there is some aspect of the accumulation that makes it unreasonably dangerous. *Mann, supra* at 332.

Reversed and remanded. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh